GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-040

TORRIE CUNNINGHAM,

Claimant–Respondent,

v.

CHILDREN'S STUDIO SCHOOL AND THE HARTFORD,

Employer and Carrier-Petitioners.

Appeal from a Compensation Order by
The Honorable Nata Brown
AHD No. 11-088, OWC No. 664990

Chad Michael, Esquire for the Petitioner
Lauren Pisano, Esquire for the Respondent

Before HEATHER C. LESLIE,[1] LAWRENCE D. TARR, and MELISSA LIN JONES, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the February 15, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted the Claimant's request for authorization for surgery and temporary total disability benefits from the date of the surgery to the date of release. We AFFIRM, in part and VACATE, in part.

[1]Judge Heather C. Leslie is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-04 (October 5, 2011).

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant worked as an Enrollment Officer with the Employer. On October 26, 2009, the Claimant suffered an injury to both knees after falling on a flight of stairs. The Claimant sought medical treatment, eventually coming under the care and treatment of the medical providers at Maryland Orthopedics, including Dr. Raymond Drapkin and Dr. Michael Franchetti.

Dr. Drapkin first evaluated the Claimant and initially opined that the Claimant had internal derangement of the right knee as a result of the October 26, 2009 injury. Dr. Drapkin recommended a course of conservative treatment and an MRI. An MRI was performed on November 18, 2009. Under the impression section of the MRI, it was noted that there was no evidence of a tear in the menisci. Under the clinical section of the MRI, the Claimant's patella was noted to be normal without evidence of chondromalacia.

The Claimant continued to feel pain and discomfort in her right knee. Dr. Drapkin recommended cortisone shots which the Claimant underwent. The shots only provided temporary relief. Ultimately, Dr. Drapkin recommended surgery, specifically an arthroscopy, to the right knee to alleviate the Claimant's traumatic chondromalacia patella.

The Employer sent the Claimant for an Independent Medical Evaluation (IME) with Dr. Samuel Matz. Dr. Matz took a history of the injury, performed a physical examination, and reviewed the medical records, including the results of the MRI. Dr. Matz opined that the Claimant's work injury had resolved and that she required no further treatment.

The Employer also submitted the Claimant's case to Utilization Review (UR) on two occasions, July 15, 2010 and August 21, 2010. The first UR report determined the requested surgery was not medically necessary or appropriate. An appeal ensued and the second UR report upheld the initial UR report's conclusion that right knee surgery was not medically appropriate.

A Formal Hearing was held on July 27, 2011 on the Claimant's request for authorization for surgery to her right knee. At the Formal Hearing, the Employer raised two issues: 1) whether or not the Claimant's right knee condition is medically causally related to the injury of October 26, 2009 and 2) whether the surgery requested was reasonable and necessary. A CO was issued on February 15, 2012 granting the Claimant's claim for relief.

The Employer timely appealed The Employer argued the CO is not supported by the substantial evidence in the record as the ALJ based her conclusions on an incorrect and incomplete recitation of the facts. The Employer also argues the medical evidence submitted was sufficient to show the surgery requested was not reasonable or necessary.

The Claimant opposed. The Claimant argues the CO is supported by the substantial evidence in the record.

THE STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether

the legal conclusions drawn from those facts are in accordance with applicable law. S*ee* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*. ("Act") at §32-1521.01(d) (2) (A) and *Marriott International v. DOES,* 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id*. at 885.

DISCUSSION AND ANALYSIS

As a preliminary matter, we note that both parties submitted exhibits attached to their respective briefs. These exhibits included specific medical reports to support their arguments. The parties are reminded that 7 DCMR § 258.3, states,

> An Application for Review must include the following:
>
> (a) An original and three (3) copies of the Application for Review, and
>
> (b) An original and three (3) copies of a supporting memorandum of points and authorities setting forth the legal and factual basis for requesting review.

A review of the exhibits attached to the Employer's application for review, as well as the Claimant's opposition, include documents that were submitted by the Employer as well as the Claimant as evidence at the Formal Hearing. No explanation is offered by either party why the exhibits are attached especially as they were submitted into evidence at the Formal Hearing. We remind the parties that the CRB does not have the authority to review a case *de novo*.[2] The attached documents are duplicative in nature and are unnecessary.

The Employer's first argument is the ALJ's "decision was based on incorrect findings of fact which lead to an incorrect conclusion as Her Honor failed to address the specific medical diagnosis which is the basis behind the recommended right knee surgery." Employer's argument unnumbered. The Employer takes issue with the apparent lack of discussion in the findings of fact of any medical reports after April 27, 2010, the IME of Dr. Matz, or of either UR reports. This argument fails as it is clear in the analysis section of the CO that the ALJ considered the IME report and both UR reports. Moreover, the ALJ specifically states in footnote 1 that "while each documentary exhibit received in evidence is not specifically reference in the discussion, all evidence of record was reviewed as part of this deliberation." It is clear the ALJ took into consideration all the evidence, even if not specifically referenced. We also remind the Employer that the ALJ is not required to inventory all the evidence.[3]

The Employer also argues that as the ALJ did not address the Dr. Drapkin's medical diagnosis of traumatic chondromalacia (which the Employer posits was inaccurate in light of the results of the MRI), this renders the decision unsupported by the substantial evidence in the record. We reject this argument as it calls for the ALJ to question the opinion of the medical expert, Dr. Drapkin, and

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[2] 7 DCMR § 266.1.

[3] See *Sturgis v. DOES,* 629 A.2d 547, 554 (D.C. 1993).

come to her own contrary medical conclusion. This is beyond the authority of the ALJ.[4] The ALJ relied upon the medical opinions presented, including those of Dr. Drapkin who had an opportunity to review the MRI and his associate, Dr. Michael Franchetti. Specifically,

> Claimant also presents medical records in support of her claim. Dr. Drapkin opined on November 6, 2009 that Claimant had internal derangement of the right knee as a result of the work-related injury from October 26, 2009 (CE 2, p.15). On November 24, 2009, Dr. Drapkin reviewed the MRI of Claimant's right knee, which was performed on November 18, 2009 (CE 2, p. 12). It revealed some mild degenerative changes, and no evidence of any torn menisci. In his examination of Claimant on January 19, 2010, Dr. Drapkin noted that she had pain with extension, as well as patellofemoral pain. He again opined that Claimant had internal derangement in her right knee as a result of the work-related injury (CE p.10).
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> Further, another orthopedic surgeon in Dr. Drapkin's office, Dr. Michael A. Franchetti, examined Claimant on September 14, 2010 (CE, p.2). In his physical examination of her, Dr. Franchetti noted that Claimant had patellofemoral tenderness and retropatellar pain with patellar grind and patellar inhibition testing. Dr. Franchetti opined that Claimant had internal derangement of her right knee with traumatic chondromalacia patella, right knee, as a result of the work injury of October 26, 2009.

CO at 4-5

It is clear that the ALJ relied upon these medical experts and their opinions in coming to her conclusion. We find the no error in the above analysis and affirm the CO's finding that the current right knee condition is causally related to the work injury of October 26, 2009.

The Employer's next argument is that the "medical evidence submitted was sufficient to show that the Claimants recommended surgery to repair her alleged 'traumatic chondromalacia patella' was not reasonable or necessary." Employer's argument unnumbered. In support of this argument, the Employer points to the lack of objective evidence, the lack of medical treatment between April 21, 2010 and May 25, 2010, and the results of the MRI as support for the proposition that the Claimant failed to prove her surgery is reasonable or necessary. We reject this selective reading of the evidence.

As stated above, the ALJ took into consideration all of the evidence, including the medical reports of Dr. Drapkin, Dr. Franchetti, Dr. Matz and the two UR reports when concluding not only that the Claimant's right knee condition is medically causally related to the work injury, but also that the surgery was reasonable and necessary. The ALJ correctly noted the applicable statute and law when reasonableness and necessity is at issue and analyzed the UR reports and found them lacking.

[4] *Cooke-Seals v. The Bank Fund Staff Federal Credit Union*, CRB No. 09-131, AHD No. 09-144, OWC No. 653446 (May 10, 2010).

Specifically,

> Employer submits a UR dated July 15, 2010, prepared by the initial clinical reviewer, Nicole McPeck, a registered nurse (EE 3). Dr. Kenneth Bayles, DO, orthopedic surgeon reviewed the recommendation of Ms. McPeck. The UR opinion that the requested right knee arthroscopy is not considered to be reasonable or medically necessary is flawed, however, as it states that there was no report in the available medical documentation of the outcomes of conservative management such as physical therapy, rehabilitation, local injection, or home exercising. Dr. Drapkin documented Claimant's physical therapy treatment and both he and Dr. Franchetti administered injections in her right knee. This UR opinion is rejected, as it was based upon insufficient medical evidence.
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> On September 21, 2010, another UR was conducted, pursuant to a request for a standard appeal of the July 15, 2010 UR determination (EE 1). The second UR was conducted by initial clinical reviewer Jeannie Cosco, RN, and reviewed by Dr. Robert Winans, M.D. The date of injury listed on page one of the UR is January 23, 2009, which is not accurate. The date of injury listed on page two is January 23, 2009, which is not accurate. The correct date of Claimant's injury is never mentioned in the report. The recommendation was that the surgery requested was not medically indicated, reasonable, or necessary.
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> Only one medical record of Dr. Drapkin, dated January 25, 2010, is listed as being reviewed. There were at least 11 orthopedic evaluation reports of Claimant's appointments with Dr. Drapkin available at the time the UR was performed, which would show that Claimant had undergone a regimen of conservative treatment, and that she had on-going right knee pain for almost one year after her accident. This UR opinion is rejected, as it was based on only an MRI image, which was described as normal, and one report of the treating physician out of 11. A single report does not show the history of Claimant's injury, her subsequent treatment, and her on-going disability. The documentation reviewed also did not include the opinion of another orthopedic surgeon, Dr. Franchetti, who opined that the surgery was reasonable and necessary. The second UR is based upon insufficient medical evidence, and will not be credited.

CO at 6-7.

We find no error in the ALJ's analysis and rejection of the UR reports.[5] Moreover, we find no error in the ALJ rejecting the opinion of Dr. Matz. The ALJ gave cogent reasons to reject the UR reports and the IME, and found persuasive the opinions of Dr. Drapkin and Dr. Franchetti.

[5] *Haregewoin v. Loews Washington Hotel*, CRB No. 08-068**,** AHD No. 07-041A, OWC No. 603483 (February 19, 2008). The Compensation Review Board's Decision and Order transposes the claimant's name; the claimant's name is Haregewoin Desta not Desta Haregewoin. See *Desta v. Loew's Washington Hotel*, AHD No. 07-041A, OWC No. 603483 (December 7, 2007).

Finally, the Employer states that the Claimant also had not carried her burden as the Claimant had not submitted a separate UR report. We reject this argument.

When it appears that the necessity, character, or sufficiency of medical care or service to an employee is improper or that medical care or service scheduled to be furnished must be clarified, the Mayor, employee, or employer may initiate review by a utilization review organization or individual. D.C. Code § 32-1507 (b)(6)(B).[6] The CRB has mandated that this process is a mandatory process.[7] Traditionally, as with the case at bar, when the Employer questions the reasonableness and necessity of the requested medical treatment, the Employer initiates UR.[8] The Employer submitted two UR reports in its defense to the Claimant's request for surgery, satisfying this mandatory process. Nowhere in the statue is it required that both parties submit separate UR reports nor does the Employer refer to any cases that stand for such a proposition. The Claimant relied upon the medical opinions of Dr. Drapkin and Dr. Franchetti to support her claim. The ALJ accorded these physicians more weight than that of the IME and UR providers. We affirm.

Finally, we must address the ALJ's prospective award, specifically the award of temporary total disability from the date of the surgery to the date of release. Although not raised on appeal, we are constrained to vacate this part of the award as it is in error for the ALJ to prospectively award benefits as this award assumes the Employer will not voluntarily make compensation payments after the surgery. As discussed with approval in *Thomas v. DOES*, the District of Columbia Court of Appeals (DCCA) noted that the Act "was designed to encourage voluntary payment of compensation" noting that §32-1515(a) states that where voluntary payments of compensation are made by the Employer, an award is not necessary.[9] The Act thus encourages the Employer to

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[6] *Gonzalez v. UNNICO Service Company*, CRB No. 07-005, AHD No. 06-155, OWC No. 604331 (February 21, 2007).

[7]See *Chaupis v. George Washington University*, CRB No. 08-075, AHD No. 07-112A (March 4, 2008, *McCormick v. Children's National Medical Center*, CRB No. 09-016, AHD No. 08-353 (January 2, 2009). Specifically, it has been established that (1) a formal hearing is available to resolve a dispute that remains following the Utilization Review (UR) process, (2) the UR process must be concluded prior to the matter being presented to the agency for resolution in such a hearing, (3) the outcome of that process is to be accorded equal initial weight to the opinion of a treating physician, and (4) the process is not a process of "independent medical evaluation" as that term is used to ordinarily describe a litigant's obtaining a second medical opinion from a non-treating physician for litigation purposes. *McCormick*, supra, at 6.

[8] It is also noteworthy to point out that had the Claimant chosen to obtain a separate UR report, § 32-1507 (b)(6)(E) states "the Employer shall pay the cost of a utilization review if the employee seeks the review and is the prevailing party."

[9] 547 A.2d 1034, 1035 (D.C. 1988). The Court in *Thomas* also noted, relying on *Powell v. Wrecking Corp. of America*, H&AS No. 84-540, OWC No. 0051161 (March 4, 1987),

> "The Acting Director considered a case similar to the one at bar. As in this case, the employee attempted to press a claim for a compensation award even though the employer was making voluntary compensation payments. Unlike the case at bar, no hearing was held, because the Acting Director dismissed the application for a hearing for lack of issues in dispute. The Acting Director acknowledged in *Powell* that § 36-320 (c), standing alone, appears to give any interested party an unqualified right to a hearing upon request. She observed, however, that such a reading would render § 36-315 (a) and (h) virtually meaningless. She pointed out that § 36-315 (a), the Act's mechanism for disposing of undisputed claims, requires the employer to pay compensation without an award unless the employer controverts its liability to pay. Administering the program this way, she stated, provides "an efficient, workable framework designed to conserve economic and administrative resources." *Powell, supra*, at 3. She noted her agreement with Professor Larson's statement that

voluntarily pay the Claimant temporarily totally disability during the period after the surgery, if any, the Claimant is temporarily and totally disabled. Until such time the Employer controverts the Claimant's right to compensation during this period, an award of compensation is premature.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the February 15, 2012 Compensation Order authorizing surgery to her right knee is **AFFIRMED**.

That portion of the order awarding temporary total disability from the date of surgery to the date of release is **VACATED**.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

June 25, 2012
DATE

"the successful administration of a compensation law depends to a much greater extent upon the machinery adopted for disposing of the undisputed claim than upon the methods of procedure employed in litigation of the contested case." *Id.* (quoting 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 82.10 (1983) (citation omitted)). The Council's decision to rely on voluntary payments by employers without an award, she concluded, represented a rational policy choice. *Id.* at 1036.